

COLORADO-UTE ELECTRIC ASSOCIATION, INC.

IBLA 83-11

Decided February 9, 1984

Appeal from a decision of the Colorado State Office, Bureau of Land Management, determining the fair market rental of communications site right-of-way C 30057.

Set aside and remanded.

1. Appraisals -- Communication Sites -- Rights-of-Way: Appraisals

Where BLM has determined the fair market rental values of a communications site right-of-way in accordance with accepted appraisal procedures but on appeal the grantee presents a summary of evidence that, if proven, would establish that the charge is excessive, the matter will be referred for a hearing at the BLM State Office in accordance with the basic procedural standards set forth in Circle L, Inc., 36 IBLA 260 (1978).

2. Federal Land Policy and Management Act of 1976: Rights-of-Way -- Fees -- Rights-of-Way: Federal Land Policy and Management Act of 1976

Under Departmental regulation 43 CFR 2803.1-2(c), a nonprofit electric distribution cooperative whose principal source of revenue is customer charges is not eligible for an exemption or reduction of fair market rental imposed for a right-of-way under sec. 504(a) of the Federal Land Policy and Management Act of 1976, 43 U.S.C. § 1764(g) (1976).

APPEARANCES: John R. McNeill, Esq. and Carol A. Curran, Esq., Montrose, Colorado, for appellant.

OPINION BY CHIEF ADMINISTRATIVE JUDGE HORTON

On July 8, 1981, the Colorado State Office, Bureau of Land Management (BLM), granted Colorado-Ute Electric Association, Inc. (Colorado-Ute), right-of-way C 30057 for a microwave radio site on Monument Peak in Garfield County, Colorado, pursuant to Title V of the Federal Land Policy and Management Act of 1976 (FLPMA), 43 U.S.C. §§ 1761-1771 (1976), and 43 CFR Part 2800.

The grant provided a nonexclusive right to construct, operate, and maintain a communication site, described as 100 by 100 feet or 0.23 acre in size, and an access road (with underground electric cable) 6 feet on each side of the centerline for 1,000 feet or 0.26 acre, for a term of 30 years. Under the conditions of the grant, Colorado-Ute agreed to pay the fair market rental value for the right-of-way upon a determination thereof by BLM.

By decision dated August 18, 1982, BLM notified Colorado-Ute that it had determined the fair market rental to be \$600 per year for the 5-year period beginning July 8, 1981, and ending July 7, 1986. BLM used the comparable lease method of appraisal. This is the preferred method for appraising the fair market value of communication sites where there is sufficient comparable rental data and appropriate adjustments are made for differences between the subject site and other leased sites. See American Telephone & Telegraph Co., 77 IBLA 110 (1983); Full Circle, Inc., 35 IBLA 325, 85 I.D. 207 (1978). Colorado-Ute's right-of-way site was compared to three communication sites in Colorado with respect to the following factors: Location, physical characteristics, access, power, tenure, time, and size. BLM assessed whether the site at issue was superior, inferior, or comparable to the sample leases for each factor and then made an overall comparison considering the relative importance of each factor. The comparable lease rentals ranged from \$600 to \$1,200 per year. BLM concluded that Colorado-Ute's site was most comparable to the lease having a \$600 annual rental. See Appraisal Report for Right-of-Way C-30057.

Colorado-Ute timely appealed the rental determination. In its statement of reasons, Colorado-Ute contends that BLM's appraisal report is in error because the report locates the communication site in Rio Blanco County rather than Garfield County, describes the site as "+/- .50" acre rather than 0.23 acre for the site and 0.26 acre for the access road, and uses for comparison leased, rather than licensed, parcels of different sizes, two of which are not located in Garfield County or any adjoining county. Colorado-Ute claims that the fair market rental is substantially less than \$600 per year. It also argues that BLM abused its discretion in assessing a fair market rental fee at all because "under 43 CFR § 2803.1(c)" no fee or a less-than-fair-market-value fee may be authorized for cooperatives whose principal source of revenue is customer charges.

Colorado-Ute requests that a hearing be held so that it can present evidence of the fair market rental value of the right-of-way grant and its cooperative status. On May 2, 1983, the Board ordered Colorado-Ute to submit a precis of the evidence it would present if a hearing were allowed so that the Board could evaluate the necessity for such a hearing. In response to the order, Colorado-Ute states that it will present specific evidence to support the allegations of error and the arguments made in its statement of reasons. Specifically, Colorado-Ute submits it will show by testimony and written exhibits that (1) the actual area occupied by its facilities is less than 0.23 acre and the nonexclusive nature of the grant diminishes the size of the site used and useful to it; (2) BLM's comparable parcels are not comparable because they are leased with the right of exclusive possession, they

differ in size, and they are used for different purposes; (3) the fair market rental is \$25 per year based on an appraisal prepared for it by an independent professional appraiser; (4) fees paid by it for other comparable communication sites in the vicinity of the one at issue are substantially lower than \$600 per year; 1/ and (5) it obtained a perpetual easement for a 0.48 acre access road to the site at issue for a one-time payment of \$100.

[1] The general standard for reviewing rights-of-way appraisals is to uphold the appraisal if there is no error in the appraisal methods used by BLM and the appellant fails to show by convincing evidence that the charges are excessive. Donald R. Clarke, 70 IBLA 39 (1983); Francis H. Gifford, 62 IBLA 393 (1982); Dwight L. Zundel, 55 IBLA 218 (1981); B & M Service, Inc., 48 IBLA 233 (1980). In the absence of compelling evidence that a BLM appraisal is erroneous, such an appraisal may only be rebutted by another appraisal. Dwight L. Zundel, supra at 222. In view of the evidence that Colorado-Ute indicates it will present establishing that the leases used by BLM for comparison are, in fact, not comparable, that certain other leased sites are more comparable, and that an independent appraiser has found fair market value to be \$25 per year, we grant Colorado-Ute's request for a hearing. The hearing shall be limited to the question of the validity of the BLM appraisal.

While the Board may, in its discretion, order that such a hearing be conducted before an Administrative Law Judge pursuant to 43 CFR 4.415, we find an informal hearing to be more appropriate in this case. In the past we have found that the regulatory requirement of 43 CFR 2802.1-7(e) (1979)

1/ Colorado-Ute particularly identifies three leased sites which it describes as follows:

"One lease, admittedly over 20 years old, is for a 1.435 acre site, plus additional land for access, for a 35 year term, renewable for an additional 35 years, at \$15.00 per year. A second lease, entered into in 1979, is for a 2.193 acre site, located adjacent to a county road, plus access on adjoining lands, for a 50 year term, for \$200 per year. A third lease, also entered into in 1979, is for a temporary site. It is for a 0.23 acre site, plus additional land for an access road and a power line right-of-way, for a 5 year term, renewable for up to 30 years total, at \$500 per year. The average price paid per acre for a site under such leases, without even considering the additional land used for access roads and power lines, is \$185."

Appellant's Summary of Evidence at 3-4.

It is further stated:

"Colorado-Ute has six Forest Service special use permits for communication sites. Annual fees for three sites are typically based upon a percentage of Colorado-Ute's investment in facilities at the site, ranging from \$174.80 to \$323.93 per year. No annual fee is being assessed at three other sites. These permits typically allow use of more land, including substantially more land area for access roads, than the BLM site and access road at Monument Peak." Id. at 4.

for a hearing prior to imposing rental readjustments for pre-FLPMA rights-of-way could be satisfied at the BLM State office level in accordance with the basic procedural standards set forth in Circle L, Inc., 36 IBLA 260 (1978). U.S. Steel Corp., 71 IBLA 88 (1983); American Telephone & Telegraph Co., 59 IBLA 343 (1981). The regulations governing rights-of-way granted pursuant to FLPMA do not require a hearing before rentals may be assessed or adjusted. See 43 CFR 2803.1-2. Although we have found that a hearing is necessary, the more efficient procedure would be to allow BLM to conduct the hearing consistent with the procedural guidelines of Circle L, Inc., *supra*.

[2] As to the issue of whether appellant qualifies for free use or a lesser fee, we note that section 504(g) of FLPMA, 43 U.S.C. § 1764(g) (1976), provides in applicable portion:

(g) The holder of a right-of-way shall pay annually in advance the fair market value thereof as determined by the Secretary granting, issuing, or renewing such right-of-way: * * * Rights-of-way may be granted, issued, or renewed to a Federal, State, or local government or any agency or instrumentality thereof, to nonprofit associations or nonprofit corporations which are not themselves controlled or owned by profitmaking corporations or business enterprises, or to a holder where he provides without or at reduced charges a valuable benefit to the public or to the programs of the Secretary concerned, or to a holder in connection with the authorized use or occupancy of Federal land for which the United States is already receiving compensation for such lesser charge, including free use as the Secretary concerned finds equitable and in the public interest.

The current applicable regulation, 43 CFR 2803.1-2(c), states:

(c) No fee, or a fee less than fair market rental, may be authorized under the following circumstances:

- (1) When the holder is a Federal, State or local government or any agency or instrumentality thereof, excluding municipal utilities and cooperatives whose principal source of revenue is customer charges.
- (2) When the holder is a nonprofit corporation or association which is not controlled by or is not a subsidiary of a profit making corporation or business enterprise.
- (3) When a holder provides without charge, or at reduced rates, a valuable benefit to the public or to the programs of the Secretary. [Emphasis added.]

In Tri-State Generation & Transmission Association, Inc. 63 IBLA 347, 89 I.D. 227 (1982), we held that free use is restricted to agencies of the Federal Government and to those situations where the charge is token and the

cost of collection unduly large. We also found that the exclusionary language of 43 CFR 2803.1-2(c)(1) eliminates from consideration for reduced charges under any category of 43 CFR 2803.1-2(c) cooperatives whose principal source of revenue is customer charges. Since that decision, the Board has repeatedly reaffirmed and followed these rulings. See, e.g., San Miguel Power Association, 71 IBLA 213 (1983); Northern Electric Cooperative, Inc., 66 IBLA 121 (1982); Socorro Electric Cooperative Inc., 64 IBLA 65 (1982). Thus, contrary to Colorado-Ute's argument, because its principal source of revenue is customer charges (see Statement of Reasons at 2), Colorado-Ute does not qualify for "no fee" or a less than fair market value fee.

Accordingly, pursuant to the authority delegated to the Board of Land Appeals by the Secretary of the Interior, 43 CFR 4.1, the decision of the Colorado State Office is set aside and the case is remanded for action consistent with this decision.

Wm. Philip Horton
Chief Administrative Judge

We concur:

Bruce R. Harris
Administrative Judge

R. W. Mullen
Administrative Judge.

